

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\*\*\*\*\*

FRACTUS, S.A.,  
Plaintiff

vs.

Case No. 1:18-mc-91395-PBS

IDC RESEARCH, INC.,  
Defendant

\*\*\*\*\*

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE MARIANNE B. BOWLER  
AT BOSTON, MASSACHUSETTS  
ON OCTOBER 30, 2018

APPEARANCES:

For the Plaintiff:

Lucas I. Silva, Esquire  
Foley & Lardner, LLP  
111 Huntington Avenue, Suite 2500  
Boston, Massachusetts 02199  
617-342-4000

Guillermo A. Alarcon, Esquire  
Susman Godfrey, LLP  
1000 Louisiana, Suite 5100  
Houston, TX 77002  
713-653-7828

Transcriber: Karen M. Aveyard,  
Approved Federal Court Transcriber

-----

TRANSCRIPTION PLUS  
1334 ELM STREET  
LEOMINSTER, MASSACHUSETTS 01453  
(978) 466-9383  
k.aveyard@comcast.net

APPEARANCES (continued):

For the Defendant:

David Bliss Wilson, Esquire  
Hirsch Roberts Weinstein  
24 Federal Street, 12th Floor  
Boston, Massachusetts 02110  
617-348-4314

Leigh A. Mills, Esquire  
International Data Group  
5 Speen Street, 3rd Floor  
Framingham, Massachusetts 01701  
508-988-6727

P R O C E E D I N G S

THE CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Marianne B. Bowler presiding. Today is October 30, 2018. The case of Fractus, S.A. versus IDC Research, Inc., Miscellaneous Case 18-91395, will now be heard before the Court.

Will counsel please identify yourselves for the record.

MR. SILVA: Good afternoon, your Honor. On behalf of the movant, Fractus, Luke Silva of Foley & Lardner.

THE COURT: Thank you very much.

MR. SILVA: And Guillermo Alarcon from Susman Godfrey.

MR. ALARCON: Good afternoon, your Honor.

THE COURT: Thank you very much.

MR. WILSON: Your Honor, David Wilson from Hirsch Roberts Weinstein here in Boston, and inhouse counsel from IDC, Leigh Mills.

THE COURT: Thank you very much.

Well, we're here for Docket Entry No. 1, which is plaintiff's Motion to Compel. My way of going through this is to have you go through the items one by one, tell me what you're looking for, you tell me why you don't to produce, and then I'll make a decision.

(Pause.)

1 THE COURT: Don't all jump at once.

2 MR. ALARCON: Your Honor, I don't know if you have a  
3 copy of the motion in front of you.

4 THE COURT: I have all the papers, yeah.

5 MR. ALARCON: I have a copy where I've highlighted the  
6 ones that are still -- that we think are unresolved.

7 THE COURT: Well, you can tell me by number.

8 MR. ALARCON: Okay.

9 (Pause.)

10 MR. ALARCON: Your Honor, the first one is Request  
11 No. 1, which asks for documents relating to IDC's calculations  
12 of the accused products. I guess I should say at this time we  
13 had originally requested documents related to all 42 of the  
14 products that have been accused in the underlying litigation.  
15 Through negotiations we've limited that to ten items.

16 So the requests that remain outstanding, there are six  
17 of them, all sort of relate to that. It's communications and  
18 documents related to IDC's sources, and its internal  
19 communications about its calculations.

20 THE COURT: Alright. Let me hear from your brother.

21 MR. WILSON: Thank you, your Honor.

22 Your Honor, IDC has a product, a tracker product, that  
23 deals with market, vendor and forecasting --

24 THE COURT: You can sit.

25 MR. WILSON: -- and in this case, specifically, I

1 think what Fractus is looking for is our worldwide quarterly  
2 mobile phone tracker, which we put that information out every  
3 quarter, and both ZTE and Fractus are clients ours and we give  
4 them that information. So they have that information.

5 What they are asking us to do though is to give them  
6 all the backup for how we actually calculate that information,  
7 and we have analysts, very experienced analysts, that get  
8 information from four sources: Supply side, from our channel  
9 partners, from demand side research, and then also additional  
10 secondary sources. We take all that and the analysts, based on  
11 their experience, they put together and come out with these  
12 estimated numbers and forecasts.

13 These two parties, Fractus and ZTE, are in some type  
14 of patent litigation, and apparently the numbers that we've  
15 come out with are different than the numbers that ZTE has come  
16 out with. I think Fractus admits in the papers we're a  
17 recognized source. They even cite to, in the first paragraph  
18 of their reply to the Ericsson case, where we were recognized  
19 by some other judges.

20 I do say, in the Ericsson case, we supplied that  
21 information. Ericsson came to us, asked for permission. We  
22 gave them permission to use those numbers that they purchased  
23 from us. But they didn't ask us for any of the backup, and  
24 we've never given the backup in how we calculate that to  
25 anybody. So they're essentially asking us to turn over our

1     proprietary trade secret information that companies pay us  
2     millions of dollars a year for and that's why we're really  
3     here.

4             And to the credit of Fractus, we have had  
5     negotiations. We've been able to narrow this. But the bottom  
6     line is we don't want to give away our proprietary method for  
7     making these calculations.

8             THE COURT: That sounds pretty reasonable to me.  
9             Why shouldn't I accept your brother's argument?

10            MR. ALARCON: Well, your Honor, we know that IDC is  
11     not getting its numbers from ZTE. Nonetheless, IDC has been  
12     recognized as a reliable source, and it's reliability has been  
13     put at issue in this litigation.

14            Therefore, the backup information that it uses is  
15     relevant to the case and it's not something we can get from any  
16     other source. It's something we need, given the huge  
17     discrepancy between IDC and ZTE's numbers.

18            As for the --

19            THE COURT: Have you taken any depositions?

20            MR. ALARCON: Of ZTE, your Honor? Yes.

21            THE COURT: Well, I'm not convinced you need it at  
22     this time, so denied.

23            Next. Next request.

24            MR. ALARCON: Well, the next request is Request No. 5.  
25     It relates to all communications between IDC and third parties

1       that have the sales numbers for the ten accused products that  
2       we're requesting.

3               THE COURT:   Again?

4               I'll hear from your brother.

5               MR. WILSON:   So here, if I understand the request  
6       correctly, your Honor, is they're looking for -- and I'm not  
7       sure they understand, but they think that we're just -- we go  
8       to somebody and say give us your sales data, and that's really  
9       not the way it happens.  We gather forecasting from supply  
10      side, we look at channel partners, we do our demand side  
11      research, and we look at our own forecasting to come up with  
12      those numbers.

13              So, again, I think it's not as simple as the request  
14      portrays it.  Again, it's really looking at the proprietary way  
15      that we go about gathering the information.

16              THE COURT:   Well, I have to agree.  I mean, you're  
17      looking for proprietary information here.  It's just not that  
18      simply produced.

19              MR. ALARCON:   Well, your Honor, we're asking for that  
20      and for the underlying data.

21              THE COURT:   You want it all.

22              MR. ALARCON:   I believe this particular request is  
23      more specific towards the underlying data which would not be  
24      trade secrets or proprietary because it's something they're  
25      getting from third parties.

1           And with respect to the trade secrets and proprietary  
2     information --

3           THE COURT:   You've had a meet and confer?

4           MR. ALARCON:   Yes.

5           THE COURT:   Yeah.

6           MR. ALARCON:   With respect to that, we just don't know  
7     enough about their sources, so, I mean, some of these --

8           THE COURT:   Well, have you deposed them?

9           MR. ALARCON:   IDC?

10          THE COURT:   Yeah.

11          MR. ALARCON:   No, your Honor.

12          THE COURT:   Well, isn't that the place to start?

13          MR. ALARCON:   Well, yes, we could have, but our  
14     position is that a deposition would have been more fruitful if  
15     we had the underlying documents.   We could get --

16          THE COURT:   I think the best way to proceed is to have  
17     a deposition, see what you can get, and then come back and  
18     renew these requests if you don't have what you need.

19          MR. ALARCON:   We would be amenable to postponing these  
20     proceedings so that we could take a deposition of an IDC  
21     representative.

22          THE COURT:   Alright.   You can provide the right  
23     person.   You know, it may be that you instruct them not to  
24     respond to certain things, but I think at least it might be  
25     able -- he might be able to tease out some information that



1 would be helpful.

2 MR. WILSON: So, your Honor, maybe on the timing on  
3 this too, they're compelling -- they're trying to get the  
4 information from ZTE and ZTE has objected to that, and they're  
5 sort of fighting through that. We feel like we're the third  
6 party sitting here getting sort of caught between these two  
7 giants that are having this patent fight.

8 Is it possible that maybe they first work through  
9 their discovery with ZTE, and then if still there's --

10 THE COURT: What is your discovery schedule in the  
11 case in chief?

12 MR. ALARCON: Your Honor, the case just got  
13 transferred before fact discovery had closed. We're not sure  
14 what's going to happen. We just got assigned a new judge.

15 We do have --

16 THE COURT: So is fact discovery technically closed at  
17 this time?

18 MR. ALARCON: Well, we have --

19 THE COURT: In which case this motion is  
20 inappropriate.

21 MR. ALARCON: Well, we have pending Motions to Compel.  
22 We had a deadline to file Motions to Compel and this --

23 THE COURT: And what was that deadline?

24 MR. ALARCON: It was September -- it was  
25 mid-September. It was this -- I don't remember the exact date,

1 but this motion was filed within the deadline.

2 THE COURT: Well, the deadline is important to me.  
3 You should know that. Look at your -- you must have it in your  
4 notes someplace.

5 MR. ALARCON: I believe it was...

6 (Pause.)

7 MR. ALARCON: September 17th, your Honor.

8 THE COURT: On the day you filed the motion.

9 MR. ALARCON: Yes.

10 THE COURT: Alright. Well, I would say the motion is  
11 denied without prejudice at this time. It can be renewed if  
12 discovery is opened up so that you can take a deposition. But  
13 if you didn't take the deposition prior to this date and you  
14 don't get more discovery, I think you might be out of luck.

15 So denied without prejudice at this time.

16 MR. WILSON: Thank you, your Honor.

17 THE COURT: You're welcome.

18

19 (The hearing was concluded.)

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Karen M. Aveyard, Approved Federal Court Transcriber, do hereby certify that the foregoing transcript, consisting of 10 pages, is a correct transcript prepared to the best of my skill, knowledge and ability from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Karen M. Aveyard

Karen M. Aveyard

November 2, 2018

Date